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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID FRANK ABRANSKI,

Defendant and Appellant.

C057404

(Super. Ct. No.
06F03826)

A jury convicted defendant David Frank Abranski of premeditated attempted murder (Pen. Code, §§ 664/189; unspecified section references that follow are to the Penal Code) and being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) The jury found charged firearm enhancements to be true (§§ 12022.53, subd. (b), (c), (d)), and the court found charged prior convictions to be true as well. (§§ 667, subd. (b)-(i), 667.5, subd. (b), 1170.12.)

Sentenced to a prison term of 32 years to life plus two additional life terms, defendant appeals, contending that the

trial court erred in permitting gang-related evidence to be introduced at trial. We affirm the judgment.

FACTS AND PROCEEDINGS

Defendant's first trial ended in a deadlocked jury. Evidence in a retrial established the following:

The victim spent the early evening at the home of a friend. He watched a basketball game, drank a lot, and passed out on the couch. He woke up when he felt a gun being held to his head. The victim saw the perpetrator, who was bald, wore no shirt, and was covered in tattoos. Brief words were exchanged. When the victim tried to grab the gun, he was shot.

The victim ran into a bathroom and the defendant left the house. At the hospital, the victim described his assailant to officers and identified him as defendant.

Defendant was arrested that night at the home of his girlfriend. None of the other people present at the house offered an alibi for defendant to the arresting officers.

Investigators learned that the parties involved all knew each other and that defendant and the victim had had previous run-ins. The victim believed defendant had set him up for an arrest on drug charges, and the defendant thought the victim had been labeling him a snitch. The victim's friends (the other residents of the house) told investigators that defendant had threatened to "kick [the victim's] ass."

The residents told officers that they had not been in the living room when the assault occurred, but they heard raised

voices and a pop that they believed was a gunshot. They saw a green truck drive off quickly down the street. Defendant's girlfriend owned such a truck.

One week later, Nicole S., one of the residents, told a detective that she had not been completely forthcoming in her earlier statement because she was afraid of defendant and his gang affiliation. She gave the detective a more detailed statement, and said she recognized defendant's voice in the argument and heard him say, "You're talking shit, mother fucker." The victim responded "I didn't do anything," and the gunshot followed. The victim told her that it was defendant who had shot him.

Over the course of the investigation, the statements of the victim and witnesses changed. The victim initially identified defendant as his assailant, but later told investigators that he was not sure of that identification. At trial, however, the victim testified that he believed defendant was the person who shot him, and he remembered making such an identification to people when the shooting occurred. He explained that he had been afraid to identify defendant because he had been attacked in jail by people he thought were friends of defendant's.

At trial, several prosecution witnesses recanted their earlier statements to investigators. For example, one resident of the house where the shooting occurred told an investigator that the victim had immediately identified defendant as the attacker but, at trial, the resident denied making such a statement and said he had no idea who had shot the victim.

By the time of trial, Nicole had also recanted the statements she had made to the detective. As discussed in detail later in this opinion, the court ruled under Evidence Code section 352 that evidence that defendant was a member of the Sacramaniacs, a gang that engaged in violent behavior, was admissible to explain Nicole's fear of retaliation.

Defense witnesses testified that defendant had spent the entire evening at home with his girlfriend. His girlfriend testified that she was out of defendant's presence for only half an hour when she drove her mother to the bank in her green truck.

The jury convicted defendant of all charges, and this appeal followed.

DISCUSSION

Defendant contends that because this was not a gang case, the court erred in permitting gang-related evidence to be introduced at trial. We disagree.

As noted, several witnesses gave inconsistent statements to police officers, investigators, and at trial. One witness, Nicole, was in the house when the shooting occurred and she spoke to police officers immediately after the incident but did not give much detail. Approximately one week later, in a follow-up interview, she told a detective that her initial statement had not been completely truthful because she was very afraid of defendant. She explained that defendant was a member of a violent gang and would kill her if she said anything. She

told the officer that she had in fact overheard the incident, and heard defendant and the victim arguing and recognized defendant's voice. She heard defendant say, "You're talking shit, mother fucker," and heard the victim respond, "I didn't do anything." She was definite that the "pop" she heard was a gunshot, and she smelled gunpowder when she went into the living room. She saw a green truck drive off. The victim told Nicole that defendant had shot him. Nicole told the officer that she would not testify in court.

Realizing that Nicole's testimony might present credibility issues, the prosecution sought to introduce evidence of defendant's gang membership to explain Nicole's fear of retaliation and the reason for these inconsistencies. The trial court ruled, under Evidence Code section 352, that evidence that defendant was a member of the Sacramaniacs, a gang that engaged in violent behavior, was relevant to Nicole's testimony and admissible to establish the witness's fear of retaliation. This evidence included photographs of defendant's gang tattoos and testimony from an expert witness who briefly described the Sacramaniacs. The court also noted that photographs of defendant's tattoos were relevant because the victim said he identified defendant in part because of his tattoos.

At trial, Nicole testified that she was in the bedroom watching a movie when the incident happened. She heard yelling but could not tell how many people were involved, hear anything that was said, or identify any of the voices. She heard a sound that might have been a gunshot but she was not certain. She

denied making any of the statements attributed to her by the investigating officers.

The investigating officers described their conversations with Nicole, including her statements about being afraid of defendant and his gang connections. An expert witness briefly explained the operations of the gang in question, the Sacramaniacs.

"Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . [¶] . . . In cases not involving a . . . gang enhancement, it has been recognized that 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.],' [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, 'trial courts should carefully scrutinize such evidence before admitting it. [Citation.],' [Citations.]

"A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion. [Citations.] The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193; accord *People v. Albarran* (2007) 149 Cal.App.4th 214, 223-225.)

Initially, we note that while the court and parties discussed a possible limiting instruction for the gang-related evidence, no such instruction was given to the jury. Because defendant expressly states that he is not claiming this omission as error, the lack of instruction is not at issue.

Here, the gang-related evidence was relevant for several reasons. First, although not emphasized in this appeal, the photographs of defendant's tattoos were relevant because the victim testified that he recognized defendant in part because of the tattoos of his assailant. The tattoos included "Sacramaniacs" emblazoned on defendant's chest. The court properly concluded that the probative value of these tattoos was high. Only by viewing defendant's tattoos could the jury properly evaluate the assertion that these tattoos were distinctive enough to support the victim's claim that he could identify his attacker.

Turning to the heart of this appeal, the gang-related evidence was also relevant to explain why Nicole's trial testimony did not match the statements she gave soon after the shooting. The gang evidence was not introduced as character evidence but to explain Nicole's reticence to testify at trial. "A juror unfamiliar with the particulars of gang intimidation may well consider it abnormal for a witness not to want to testify against an individual who committed a violent crime against himself or a family member or friend. If an expert can shed light on such reluctance, the testimony is admissible." (*People v. Ward* (2005) 36 Cal.4th 186, 211.)

Here, the court allowed the prosecution to introduce evidence of defendant's affiliation with the Sacramaniacs and to introduce brief testimony from a gang expert about the violent nature of this gang. That evidence was relevant to assessing Nicole's credibility as a witness.

Defendant asserts that it was sufficient that Nicole testified that she was afraid of defendant, and that no gang evidence needed to be adduced. But the jury was entitled to judge Nicole's credibility in its entirety. As the California Supreme Court has explained: "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation for the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 869; accord *People v. Martinez* (2003) 113 Cal.App.4th 400, 413-414.)

A jury is entitled to evaluate a witness's testimony knowing it was given under circumstances that might engender retaliation. "And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have been evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the

trial.” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 (*Olguin*)).

Defendant contends that the prejudicial impact of the gang evidence was significantly more than that in *Olguin*. He points out that (1) gang-related evidence was already admissible on issues of motive and intent in *Olguin*, but would not have otherwise come up in this case, (2) a limiting instruction was given in *Olguin* but not here, (3) the gang evidence in *Olguin* was used to bolster the credibility of a witness who testified against the defendant despite having received threats, while here it was used to explain equivocal trial testimony, and (4) defendant’s membership in the Sacramaniacs was irrelevant to the question of whether Nicole was subjectively fearful about testifying. None of these “distinctions” is meaningful. The facts of a particular case will vary, as will the setting in which the question of gang evidence admissibility arises. There is no one set of circumstances that dictates a particular result. What is critical is whether the court weighed the probative value of the proffered evidence against its potential for prejudice in making a determination under Evidence Code section 352. That is precisely what happened here.

Defendant asserts that the gang evidence was cumulative because a narcotics detective had testified that informants are regarded as “snitches” and are at risk of harm. Nicole, however, was not an informant, and there was no basis for the jury to believe that any risk the victim faced as a suspected informant necessarily extended to Nicole.

The trial court acted well within its discretion in concluding that the probative value of the limited gang-related evidence outweighed its potential prejudice. There was no error.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ SIMS _____, Acting P. J.

_____ ROBIE _____, J.